No. 02-1226

Supreme Court, U.S.
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In The
Supreme Court of the United States

WILLIAM O. SCHISM AND ROBERT L. REINLIE,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals For the Federal Circuit

BRIEF OF *AMICUS CURIAE* DISABLED AMERICA VETERANS and NATIONAL ORGANIZATION OF VETERANS ADVOCATES IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The questions presented by the Petitioners are:

1) Whether the Federal Circuit—having characterized as "pay" Petitioners' receipt of contractually-based, government-provided, post-retirement, free lifetime medical care—correctly held that this Court's decision in *Bell v. United States*, 366 U.S. 393 (1961) created a "military benefits" exception to the 28 U.S.C. 1346(a)(2) (Little Tucker Act) creation of a cause of action against the government for breach of an implied contract.

2) Whether, if there is no such exception, 5 U.S.C. 301—"The head of an executive department or military department may prescribe regulations for the government of his department, the conduct of his employees, the distribution and performance of its business . . ."—authorized World War II and Korean War executive branch military departments, through recruiters and their superiors, to offer post-retirement free lifetime medical care to military personnel who served at least twenty years.

3) Whether the Commanders-in-Chief possessed the power to authorized World War II and Korean War military departments, through recruiters and their superiors, to promise post-retirement free lifetime medical care to military personnel who served at least twenty years, and, if they did, whether the Anti-Deficiency Act can be applied retroactively to abrogate the contracts made and performed as a result of those offers.

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INTEREST OF THE *AMICUS CURIAE*

Amicus Curiae Disabled American Veterans ("DAV"), a tax-exempt organization chartered by Congress in 1932, represents more than one million members of this Nation's Armed Forces.[1] The DAV advances the interests, and works for the betterment of all wounded, injured, and disabled American veterans and their families. It cooperates with the United States Department of Veterans Affairs ("VA") and all other public and private agencies devoted to the cause of improving and advancing the condition, health, and interests of veterans and their families. Among other services, the DAV provides *pro bono* representation on request to any person seeking VA benefits, without regard to whether that person is a DAV member.

Amicus curiae National Organization of Veterans Advocates ("NOVA") is a non-profit corporation formed to serve attorneys and non-attorney practitioners who represent the Nation's veterans and their dependents. In addition to providing continuing legal education to those who represent veterans, NOVA also files briefs on issues of broad applicability to veterans' rights.

The amicis likely represent, or will represent, many of the retired veterans affected by this appeal.

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[1] The parties have consented to the filing of this brief, and letters of consent are being filed herewith. In accordance with Supreme Court Rule 37.6, the *Amicus Curiae* represents that no counsel for a party authored this brief in whole or in part and no person or entity, other than the *Amicus Curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

ARGUMENT

I. Introduction

This is a very important case—not just for the many veterans directly affected by the Federal Circuit's erroneous decision, but for the greater concept that the government cannot duck its bargained-for responsibilities. There is no question in this appeal that the Government made promises to soldiers and wrongfully broke those promises. The question for this Court is whether the Government can succeed by hiding behind a legal technicality—that it can shirk its responsibility to honor its promises after the soldiers upheld their end of the bargain. The answer is that it may not, because there was broad authority for the promises.

The *amicis* believe that review is essential in this case for multiple reasons.

- This case is important because the Government is using the case to avoid a promise that it admits it made many times over many years.
- The case is important because it involves an issue central to thousands (and likely hundreds of thousands) of career veterans who are dying in large numbers and thus losing their ability ever to establish their rights against the government. *Amicis* understand that one of the Petitioners, Mr. Schism, has recently passed away from cancer. It is imperative that the issue on appeal be resolved before more of the veterans go.
- The case is important for its sheer magnitude; the Government stated in its petition for rehear-

ing to the Federal Circuit that this case could cost the Pentagon $15 billion.

- Review is essential because the Federal Circuit relied on a portion of a statute that this Court has never considered, and whose text clearly favors Petitioners.

- Review is essential *in this appeal* because there will be little opportunity for there to be other appeals or for the issue to "percolate" through other circuits, due to the Federal Circuit's unique jurisdiction over Little Tucker Act cases, *see* 28 U.S.C. § 1295(a)(2); 28 U.S.C. § 1346(a)(2).

- Review is also essential because the central issue in the case requires interpretation of a provision in a federal statute—5 U.S.C. § 301—that this Court has not previously considered. To hold as it did, the Federal Circuit majority also misread several decisions by this Court, including *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). That the Federal Circuit decided the case *en banc* with a vigorous dissent emphasizes the importance of the case.

II. The Military Secretaries Had The Authority To Bind The Government

It has long been the law that the Government may not take from a party "the fruits actually reduced to possession of contracts lawfully made." *Sinking Fund Cases*, 99 U.S. 700, 720 (1878); *see Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41, 55 (1986). Here, the Govern-

ment contracted with soldiers through its empowered agents—the recruiters—and the Government cannot back out after the soldiers have performed their end of the bargain.

The statutory provision relevant to this appeal, 5 U.S.C. § 301, provides department heads with broad authority within their own spheres of influence:

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.

This provision by its plain terms gives expansive power to prescribe regulations for a department and the use of its property, and it states no limit for that power. Because the "ordinary, contemporary, common meaning" of the statutory text controls, *Perrin v. United States*, 444 U.S. 37, 42 (1979); *see also Hallstrom v. Tillamook County*, 493 U.S. 20, 25 (1989), the Federal Circuit's ruling limiting the statute beyond its language was error.

The Federal Circuit never looked to the statutory language; instead, it attempted to discern the statute's meaning solely from this Court's statements in *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). But that case dealt with the portion of Section 301 that is of no concern here. In addition, *Chrysler* addressed an issue—whether the Labor Secretary was authorized to withhold information from the public—that is nothing like the issue here. The general, off-hand

statements from *Chrysler* cannot overcome the plain and broad language of the statute.

Moreover, the Federal Circuit majority's analysis is itself internally inconsistent. In particular, the majority accepted the Government's position that Section 301 provided authority for the regulations that enacted the CHAMPUS healthcare program—a comprehensive military healthcare system. Yet the majority held that Section 301 could *not* support the much more limited promises here. *See Schism v. United States*, __ F.3d __, 2002 WL 31549178, at *17-18 (Fed. Cir. Nov. 18, 2002) (en banc). There is simply, no support in the statute for such a fine (and backward) distinction.

With this dearth of support for its analysis, the Federal Circuit majority should have at least given deference to the long-time reading that the secretaries gave to the statute. The secretaries reasonably understood themselves as having the power to make these promises, and that long-time understanding has become binding on the government:

> We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that department—a construction which, though inconsistent with the literalism of the act, certainly comports with the equities of the case—should be considered as decisive in this suit. It is a settled doctrine of this court that in case of ambiguity the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such con-

> struction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced.

United States v. Alabama Great Southern R.R. Co., 142 U.S. 615, 621 (1892); *see also Luckenbach S.S. Co. v. United States*, 280 U.S. 173, 182 (1930). This point, ignored by the Federal Circuit majority, was properly emphasized by the dissent.

III. Once Vested, The Veterans' Contract Rights Could Not Be Abrogated

Congress could not abrogate Schism and Reinlie's contract rights after the men accepted the recruiters' offers. As this Court noted long ago:

> The United States are as much bound by their contracts as are individuals. If they repudiate their obligation, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.

The Sinking Fund Cases, 99 U.S. at 719. The same principle holds true today. *See, e.g., United States v. Winstar Corp.*, 116 S.Ct. 2432 (1996).

The benefits for which Schism and Reinlie contracted are not mere gratuities that can be taken away at Congress' whim. Rather, healthcare was a central feature of the implied contract between the Veterans and the government. Healthcare is a mat-

ter of great importance to any employee. Indeed, both Schism and Reinlie have stated such in this very case. As a result, later legislation, such as the Anti-Deficiency Act, cannot negatively impact the retired veterans' rights. There is simply no basis on which to conclude that the Government could enter these agreements, but then validly back out of them years later.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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